

84-1240

No.

Supreme Court, U.S.
FILED

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ALEXANDER L. STEVAG
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

LAKE COAL COMPANY, INC. Petitioner

versus

ROBERTS & SCHAEFER
COMPANY Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE SIXTH CIRCUIT

MR. RONALD G. POLLY
MR. GENE SMALLWOOD, JR.
P.O. Box 786
104 N. Webb Avenue
Whitesburg, Kentucky 41858
(606) 633-4469

Attorneys for Petitioner

QUESTIONS PRESENTED FOR REVIEW

I. Whether the decision of the United States Court of Appeals for the Sixth Circuit conflicts with the applicable decisions of this Court where the district court's stay of federal jurisdiction avoids piecemeal litigation and duplicative judicial time and effort?

II. Whether the United States Court of Appeals for the Sixth Circuit erred in reversing the stay order entered by the district court wherein the federal action involves only questions of state law, there is no federal policy regarding the specific case requiring exercise of jurisdiction and the stay avoids piecemeal litigation?

III. Whether the decision of the United States Court of Appeals for the Sixth Circuit, misconstrued the district court's placing of the burden of persuasion, on the motion to stay, and is therefore, in conflict with applicable rulings of this Court and other circuit courts of appeal?

PARTIES TO THE PROCEEDING

| | |
|--|----------------------------|
| PETITIONER (Defendant-Appellee) | Lake Coal Company, Inc. |
| RESPONDENT (Plaintiff-Appellant) | Roberts & Schaefer Company |

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. _____

LAKE COAL COMPANY, INC. - - - Petitioner

v.

ROBERTS & SCHAEFER COMPANY - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

STATEMENT OF JURISDICTION

On November 20, 1984, the United States Court of Appeals for the Sixth Circuit reversed and remanded the order entered by the District Court for the Eastern District of Kentucky staying exercise of jurisdiction, pending adjudication of the parallel state action. (Appendix p. 1a).

A timely petition for rehearing, filed with the appellate court was denied on December 21, 1984. (Appendix p. 7a).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

On September 14, 1981, the parties herein entered into a written contract for Roberts & Schaefer Company (hereinafter R&S) to construct a closed circuit

coal washing facility for Lake Coal Company, Inc. (hereinafter Lake) in Letcher County, Kentucky. Prior to the date of contract, construction was begun on the facility by Langley & Morgan Corporation and/or Darby Construction Company, wholly owned domestic subsidiaries of Elgin National Industries, Inc., the parent corporation of R&S. The facility was to be completed no later than April 1, 1982. However, due to negligence on the part of Elgin National Industries, Inc., and R&S in the design of the facility, and negligence, concealment, misrepresentation and fraud, or breach of duties or contract on the part of R&S, Elgin National Industries, Inc., Langley & Morgan Corporation and/or Darby Construction Company, in the construction and installation of the facility, it failed to operate, initially due to cracking and total loss of water from the large concrete static thickener used for clarifying the plant water. The facility has only recently been made operational through the efforts of Lake alone.

On November 12, 1982, Lake filed its complaint in state court against R&S, Elgin National Industries, Inc., Langley & Morgan Corporation and Darby Construction Company alleging alternative causes of action: breach of contract; negligent design, construction and installation of the facility; misrepresentation, concealment and fraud; and, breach of expressed and implied warranties. On December 1, 1982, R&S and Elgin National Industries, Inc., filed a petition for removal with the United States District Court for the

Eastern District of Kentucky alleging that Lake did not have a valid claim against the domestic subcontractors and therefore, they were fraudulently joined in the suit solely to defeat jurisdiction. The action was docketed. On December 23, 1982, Lake filed a motion to remand and the issue of the validity of Lake's cause of action in the state court suit against Darby Construction Company and Langley & Morgan Corporation was exhaustively briefed and argued. On February 15, 1983, the district court found that the domestic subcontractors were not fraudulently joined and remanded the action to state court.

Having failed in its efforts to remove this action to federal court, R&S, alone, filed a complaint against Lake in the United States District Court for the Eastern District of Kentucky on April 6, 1983. In order to obtain diversity jurisdiction, the complaint omitted the domestic subcontractors, Langley & Morgan Corporation and Darby Construction Company, as parties. The complaint, a duplication of R&S's counterclaim in the state action, was filed as a defensive tactic to encumber Lake with duplicative litigation.

On April 29, 1983, Lake filed a motion to dismiss or stay the federal action. In the numerous briefs filed in support and in opposition to this motion, the application of the balancing test set out in *Colorado River Water Conservation District v. United States*, 424 U. S. 800, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976), and the Supreme Court's rulings in *Brillhart v. Excess Insurance Company*, 316 U. S. 491, 62 S. Ct. 1173,

86 L. Ed. 1620 (1942); *Will v. Calvert Fire Ins. Co.*, 437 U. S. 655, 98 S. Ct. 2552, 57 L. Ed. 2d 504 (1978); and *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*, — U. S. —, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983), were exhaustively briefed and argued.

On July 15, 1983, the district court entered an order which stated:

“in the interest of fairness to all parties concerned, as well as to avoid multiplicity of judicial time and effort and piece-meal [sic] litigation, this action is now STAYED pending the final adjudication of the aforementioned state action in Letcher Circuit Court.” (Appendix p. 6a).

The district court's order was appealed to the United States Court of Appeals for the Sixth Circuit by R&S. After docketing, R&S filed a motion for summary reversal, arguing that the district court had improperly applied *Colorado River Water Conservation District v. United States*, *supra*, in allocating the burden of persuasion on the motion to R&S. On November 3, 1983, this motion was denied.¹ However, on November 20, 1983, the Court of Appeals entered an order finding that the district court had erred in assigning the burden of persuasion requiring “R&S to show good cause why concurrent jurisdiction should be exercised” and that “exceptional circumstances” counseling against exercise of federal jurisdiction do

¹Jones, Krupansky and Wellford, Circuit Judges, comprised the panel.

not exist in this case. (Appendix p. 1a). Additionally, the Court of Appeals found that the stay did not avoid piecemeal litigation because Lake did not show “that it has an arguably valid claim under Kentucky law against the non-signatory contractors”. (Appendix pp. 3a-5a). The appellate court therefore, reversed and remanded the district court's stay order with instruction to exercise jurisdiction.²

On December 21, 1984, a timely petition for reconsideration was denied. (Appendix p. 7a). However, on January 4, 1984, upon motion of Lake, the Court of Appeals entered an order staying its mandate for thirty (30) days pending application for writ of certiorari to the Supreme Court. (Appendix p. 8a).

REASONS FOR ALLOWANCE OF THE WRIT

I. The Decision of the United States Court of Appeals for the Sixth Circuit Conflicts With the Applicable Decisions of This Court Where the District Court's Stay of Federal Jurisdiction Avoids Piecemeal Litigation and Duplicative Judicial Time and Effort.

In the case at bar, all the parties in the federal action are included in the state action; some parties included in the state action, however, are omitted in the federal action. The issues in the state action are broader and more inclusive than those in the federal action and the allegations in the federal action are included in the issues presented for adjudication in the state action. Also, the state courts of Kentucky afford

²Keith, Contie, Circuit Judges, and Peck, Senior Circuit Judge, comprised the panel.

an adequate forum for this litigation and there are no rights or remedies available to R&S in the federal action which are not also available in the state action. Recognizing these factors, the district court held that in fairness to all parties and to avoid piecemeal litigation and duplicative judicial time and effort the federal action should be stayed. (Appendix p. 6a). The district court, applying the "balancing test" set out in *Colorado River Water Conservation District v. United States, supra*, found that these exceptional circumstances counselled against exercise of jurisdiction despite the court's "virtually unflagging obligation" to exercise jurisdiction.

However, the United States Court of Appeals for the Sixth Circuit held that "exceptional circumstances did not exist in this action." Particularly, the court found that piecemeal litigation may not be avoided by the stay of federal jurisdiction because R&S could file a separate action in the state courts against the subcontractors if held liable to Lake for damages and further, Lake had not shown that it had an arguably valid claim under Kentucky law against the subcontractors in the state action. Since a judgment in the federal action would completely decide all issues between all parties, there was no piecemeal litigation to avoid. (Appendix pp. 2a-5a).

Lake respectfully contends that the Courts of Appeals' opinion conflicts with the applicable decisions of this Court and other circuit courts of appeal. The appellate court overlooked the fact that the state ac-

tion was more inclusive of parties and issues than the federal action because of its preoccupation with an imagined possible future action by R&S against the subcontractors, its sibling corporations. Imaginary cases do not affect the actual circumstances that piecemeal litigation is avoided in the instant case by stay of the federal suit. Moreover, it is most doubtful that R&S would file an action against its sibling corporations in state court even if it is held liable to Lake for damages as the Sixth Circuit speculated. That point is borne out by the fact that R&S has filed no cross-claim against its sibling corporations, co-defendants, in the state action.

If the federal suit is not stayed and even if judgment is entered, it is fact, not fiction, that the parallel state action will nevertheless proceed against the subcontractors, Darby Construction Company and Langley & Morgan Corporation, and the parent corporation, Elgin National Industries, Inc., upon the same facts and law as in the instant case. This is precisely the piecemeal litigation held proper for avoidance by *Colorado River Water Conservation District v. United States, supra*, wherein this Court reversed the Seventh Circuit Court of Appeals and affirmed the district court's dismissal of the federal suit. Citing *Brillhart v. Excess Insurance Company, supra*, this Court held that the desirability of avoiding piecemeal litigation

was an exceptional circumstance justifying exercise of jurisdiction.³ The Court stated:

“This policy is akin to that underlying the rule requiring that jurisdiction be yielded to the court first acquiring control of property, for the concern in such instances is with *avoiding the generation of additional litigation* through permitting inconsistent dispositions of property.” (emphasis added). at p. 819.

In the case at bar, a determination of issues involving the design, installation and construction of the wash plant facility will be required in both the federal and state courts unless the federal action is stayed because the state action is more inclusive in parties thereto and issues therein. A judgment in the federal action resolves only one facet of the dispute and leaves the remaining issues for adjudication in the state court. Lake respectfully contends that the stay of the federal action avoids this piecemeal adjudication of this case and thereby avoids duplicative judicial time and effort. This exceptional circumstance under the facts herein presented counsels against exercise of jurisdiction.

In *Reiter v. Universal Marion Corporation*, 173 F. Supp. 13 (D.C. 1959), a stockholder derivative suit,

³This Court in *Brillhart v. Excess Insurance Company, supra*, warned “ordinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court, presenting the same issues, not governed by federal law, between the same parties. Gratuitous interference with the orderly and comprehensive disposition of state court litigation should be avoided.” at p. 495.

the court stayed federal jurisdiction holding that piecemeal litigation of underlying disputes would result unless the concurrent federal action was stayed because all of the parties in the state court action were not before the federal court. Similarly, in *Brendle v. Smith*, 46 F. Supp. 522 (S.D. N.Y. 1942), the court stayed federal jurisdiction holding that piecemeal litigation would result unless the federal action were stayed because the state action was broader and more inclusive in regard to the parties thereto and the issues therein. In *P.P.G. Industries, Inc. v. Continental Oil Company*, 478 F. 2d 674 (5th Cir. 1973), the Fifth Circuit Court of Appeals faced with the very issue presented herein, stayed the federal action stating;

“The advantages of obtaining in one suit or the other joinder of more parties affected by the controversy, even though they are not indispensable parties to the litigation, may be decisive in a given case.” at p. 683.

In the case at bar the stay of the federal action permits all issues arising out of the design, installation and construction of the wash plant facility to be determined between all parties in one action and thereby avoids piecemeal litigation and duplicative judicial time and effort. These exceptional circumstances counsel against exercise of jurisdiction. The appellate court’s contrary ruling conflicts with this Court’s decision in *Colorado River Water Conservation District v. United States, supra*, and the Fifth Circuit’s ruling in *P.P.G. Industries, Inc. v. Continental Oil Company, supra*.

The Court of Appeals failed to reach this conclusion because it misconceived that it was to determine whether Lake had a valid cause of action against the subcontractors in the state suit. In the first instance, the validity of Lake's claim under Kentucky Law was not an issue presented on appeal to the Sixth Circuit. The issue presented for appeal was whether the district court had abused its discretion, not the merits of Lake's case in state court. There was no claim raised by R&S on appeal that Lake did not have an arguably valid claim against the subcontractors in the states' action. Nor, was there any discussion by any party of the relevant facts or applicable law whereby the appellate court could make a determination on this issue.⁴ Moreover, the Court of Appeals apparently overlooked the fact that the issue of the validity of Lake's cause of action against the subcontractors in the state claim was presented, exhaustively briefed, argued and decided by the district court in a separate removal action on motion to remand. The district

⁴In its petition for reconsideration Lake cited, without discussion, the cases, briefed and argued to the district court, which demonstrate the validity of its claim against the subcontractors for negligence, concealment, misrepresentation and fraud and the status of Lake as an intended third party beneficiary of the contract between the subcontractors and R&S. The appellate court apparently overlooked these cases because of its preoccupation with the fact that the subcontractors were non-signatory to the September 1981 contract between Lake and R&S. Lake respectively submits that it is not necessary for the subcontractors to be signatory to said contract in order to have an arguably valid claim against them, in one or more of the alternative causes of action set out in its complaint.

court in finding that the subcontractors were not fraudulently joined in the state action necessarily determined that Lake had an arguably valid claim against them in the state court suit. Lake respectfully contends that the appellate court's contrary finding, without the benefit of the relevant facts or arguments as presented to the district court, constitutes error, and calls for an exercise of this Court's power of supervision. Lake, therefore, respectfully requests that its petition for certiorari be granted.

II. The United States Court of Appeals for the Sixth Circuit Erred in Reversing the Stay Order Entered By the District Court Wherein the Federal Action Involves Only Questions of State Law, There Is No Federal Policy Regarding the Specific Case Requiring Exercise of Jurisdiction and the Stay Avoids Piecemeal Litigation.

Lake respectfully contends that the appellate court failed to recognize the significance of the fact that the federal action, based on diversity jurisdiction, concerned only issues of state law and there was no federal policy regarding the specific case requiring exercise or stay of federal jurisdiction present. These unique facts distinguish the case at bar, factually, from both *Colorado River Water Conservation District v. United States*, *supra*, and *Moses H. Cone Memorial Hospital v. Mercury Construction Company*, *supra*.⁵

⁵This is particularly important since this Court has held that the balancing of exceptional circumstances against exercise of jurisdiction must be done on a case by case basis. See *Colorado River Water Conservation District v. United States*, *supra*, pp. 819-820.

In *Colorado River Water Conservation District v. United States*, *supra*, this Court noted that the McCarran Act expressed a federal policy favoring the determination of water rights by state courts. Accordingly, this Court affirmed the district court's dismissal of the federal action in deference to the parallel state action. See *Moses H. Cone Memorial Hospital v. Mercury Construction Company*, 103 S. Ct. at p. 941, footnote 29. Similarly, in *Moses H. Cone Memorial Hospital v. Mercury Construction Company*, *supra*, this Court noted that the arbitration act expressed a federal policy requiring that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." 103 S. Ct. at p. 942. It stated that the presence of federal law issues must always be a major consideration weighing against surrender of jurisdiction. Because this Court found "that there was substantial doubt" that the construction company could obtain an order compelling arbitration in the state court, it reversed the district court's stay order and remanded the action with instructions to exercise jurisdiction thereby carrying out the federal policy promoting arbitration of disputes.

In *Tai Ping Insurance Co. LTD. v. M/V Warschau*, 731 F. 2d 1141 (5th Cir. 1984), the Fifth Circuit Court of Appeals held that this Court's essential concern in *Moses H. Cone Memorial Hospital v. Mercury Construction Company*, *supra*, was not the exercise of federal jurisdiction but rather that the intent of the federal law not to delay arbitration required exercise

of jurisdiction therein. See also, *Southland Corp. v. Keating*, — U. S. —, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984).

In the case at bar there are no issues of federal law, nor is there an expressed federal policy requiring exercise of jurisdiction. Lake respectfully contends that these unique factors are significant and, when coupled with the fact that the stay avoids piecemeal litigation and duplicative judicial time and effort, counsel against exercise of federal jurisdiction.

Although this Court has not previously ruled on a case based on diversity jurisdiction where there is no federal policy regarding the specific case requiring exercise or stay of jurisdiction, this Court has noted the importance of these factors. In *Brillhart v. Excess Insurance Company*, *supra*, this Court stated that ordinarily it is uneconomical and vexatious to proceed with the exercise of federal jurisdiction where a concurrent action is pending in the state court *and the federal action is governed by state law*.⁶

Furthermore, in *Moses H. Cone Memorial Hospital v. Mercury Construction Company*, *supra*, the Court indicated that, although rare, the presence of state law issues may weigh in favor of the surrender of jurisdiction to the state court. Accord, *Gilbane Building Company v. The Nemours Foundation*, 568 F. Supp. 1085 (D. Del. 1983).

⁶Although a declaratory judgment action, it is cited with approval in *Colorado River Water Conservation District v. United States*, *supra*, at p. 878, and *Will v. Calvert Fire Ins. Co.*, *supra*, at p. 662.

It is not necessary for the state law to be unsettled in order for these factors to be significant, as the appellate court incorrectly held.⁷ Rather, it is apparent that it is the state court's greater familiarity and expertise with state law in all instances which gives this factor significance and weighs against exercise of jurisdiction. See, *Moses H. Cone Memorial Hospital v. Mercury Construction Company*, *supra*, 103 S. Ct. at p. 937.⁸

Lake therefore, respectfully contends that when these factors are coupled with the fact that the stay of federal jurisdiction avoids piecemeal litigation and duplicative judicial time and effort, as previously discussed, that exceptional circumstances existed which counsel against exercise of jurisdiction as held by the district court.

This case provides this Court with an opportunity to settle under what circumstances the presence of state-law issues weigh in favor of the surrender of jurisdiction as alluded to by this Court in *Moses H. Cone Memorial Hospital v. Mercury Construction Cor-*

⁷If the state law was unsettled, then the stay would have been appropriate under the doctrine of abstention. *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U. S. 25, 79 S. Ct. 1070, 3 L. Ed. 2d 1058 (1959). See also *Colorado River Water Conservation District v. United States*, *supra*, at pp. 814-815.

⁸Therein, this Court noted that the federal policy favoring determination of water rights by state courts was due in part to Congress' judgment that "the field of water rights is one peculiarly appropriate for comprehensive treatment in the forum having the greatest expertise assisted by state administrative officers acting under state courts. (emphasis added). 103 S. Ct. at p. 937.

poration, supra. Lake therefore, respectfully submits that its petition for certiorari should be granted.

III. The Decision of the United States Court of Appeals for the Sixth Circuit, Misconstrued the District Court's Placing of the Burden of Persuasion, On the Motion to Stay, and Is Therefore, In Conflict With Applicable Rulings of This Court and Other Circuit Courts of Appeal.

Like respectfully contends that the Court of Appeals in its opinion filed November 20, 1984, misconstrued that "the district court's order indicates that the court required R&S to show good cause why concurrent jurisdiction should be exercised." The appellate court overlooked the specific language of the district court's stay order which set out the court's rationale for the stay, as follows:

"It is hereby ordered, that in the interest of fairness to all concerned, as well as to avoid multiplicity of judicial time and effort, and piece-meal [sic] litigation, this action is now stayed. . . ." (Appendix p. 6a).

It is clear that the district court ruled that the avoidance of piecemeal litigation counselled against exercise of jurisdiction in this case and that no countervailing reasons requiring exercise of jurisdiction had been shown to exist by R&S. The district court's reference to fairness to all parties concerned indicates that the district court considered whether countervailing reasons existed for exercise of jurisdiction even after it had been shown that exceptional circumstances which counselled against exercise of jurisdiction ex-

isted. However, the Court of Appeals ignored the district court's rationale and seized upon the language in the order which did not relate to the allocation of the burden of proof.⁹ The district court's statement, upon which the appellate court based its finding, is similar to that employed by the Fifth Circuit in *P.P.G. Industries, Inc. v. Continental Oil Company, supra*. Therein, the court, after concluding that exceptional circumstances counselling against exercise of jurisdiction, existed, went on to state:

"nothing has come to the attention of this Court, which would indicate a stay would be unfair to P.P.G."

Similarly, in *Calvert Fire Insurance Company v. American Mutual Reinsurance Company*, 600 F. 2d 1228 (7th Cir. 1979), the court stated:

"Preventing a vexatious suit is similar to the interests in avoiding piecemeal litigation mentioned in *Colorado River, supra*, at 818, and would clearly justify federal deferral to the parallel state proceeding *unless there exists strong countervailing reasons* for the federal court to decide the federal suit without further delay such as prejudice to Calvert or compelling policy reasons to secure an immediate federal court decision." (emphasis added). at p. 1234.

Even in *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation, supra*, this Court noted

⁹The district court order stated "no good cause has been shown to justify litigating these same issues simultaneously in two different judicial systems." (Appendix p. 6a).

that not only had the hospital failed to demonstrate the existence of exceptional circumstances counselling against exercise of jurisdiction, but that the construction company had also shown countervailing factors indicating that federal jurisdiction should be exercised without delay.

In the case at bar, R&S raised no indication that countervailing factors exist requiring exercise of jurisdiction without delay even though Lake had demonstrated that exceptional circumstances which counselled against that exercise did exist. Instead, R&S only argued that it had an absolute right to a federal forum. As this Court is well aware, 28 U.S.C. §1332 grants only a statutory privilege of access to a federal court which is not absolute. *Brillhart v. Excess Insurance Company, supra*.

The record demonstrates that the district court assigned the burden of persuasion to Lake. It properly applied the "balancing test" in *Colorado River Water Conservation District v. United States, supra*, and, in its discretion, concluded that "in the interest of fairness to all parties concerned as well as to avoid multiplicity of judicial time and effort and piecemeal litigation" the federal action should be stayed. The appellate court's contrary ruling is in conflict with the applicable ruling of other circuit courts, and the decision of this Court in *Colorado River Water Conservation District v. United States, supra*, and *Moses H. Cone Memorial Hospital v. Mercury Construction Cor-*

poration, supra. Lake therefore, respectfully submits that its petition for certiorari should be granted.

CONCLUSION

On January 4, 1985, the United States Court of Appeals for the Sixth Circuit entered an order staying its mandate pending application for writ of certiorari to the Supreme Court. (Appendix p. 9a). Lake respectfully contends that this action by the appellate court in staying the enforcement of its order indicates that it has some question as to whether its decision is consistent with the rulings of this Court and other circuit courts of appeal or that the important issue of the application of federal law presented herein should be settled by decision of this Court. Moreover, this petition for writ of certiorari should be granted because the action of the Court of Appeals frustrates the district court in its proper application of the Supreme Court decision.

Therefore, Lake respectfully requests that its petition for writ of certiorari be granted.

Respectfully submitted,

RONALD G. POLLY
GENE SMALLWOOD, JR.
POLLY, CRAFT, ASHER & SMALLWOOD
P.O. Box 786
104 N. Webb Avenue
Whitesburg, Kentucky 41858
(606) 633-4469

Attorneys for Petitioner